In the Supreme Court of the United States

October Term, 1945.

No. 786. 38

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION, and INTERNATIONAL LADIES' GARMENT WORKERS' UNION.

No. [redacted] 39

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *Petitioner,*

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION and NATIONAL LABOR RELATIONS BOARD.

BRIEF OF DONNELLY GARMENT WORKERS' UNION IN OPPOSITION TO CERTIORARI.

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Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 151 F. (2d) 854. The prior opinion of the Circuit Court of Appeals in this case is reported in 123 F. (2d) 215. The findings of fact, conclusions of law, and order of the

National Labor Relations Board are reported in 50 NLRB 241. The prior order of the National Labor Relations Board in this case is reported in 21 NLRB 164.

Jurisdiction.

Decree of the Circuit Court of Appeals was entered October 29, 1945. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, Sec. 347 USCA.

Questions Presented.

(All italics are ours.)

(1) Where the Labor Board refused to receive or treat as material, or to give any consideration whatsoever to the sworn testimony of all the employees as to their choice of a labor union, and as to their freedom from outside influence in organizing and operating it; and the Court of Appeals sent the case back to the Board with specific instructions that such testimony is material under the circumstances of the case at bar and must be considered by the Board as material, although the exact weight given it is a matter for the Board; and where the Board on rehearing reasserted that the specific evidence, which it had been directed to treat as material, is actually *immaterial*, and making it clear beyond doubt that such is its position in the following words (A. 619):

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the DGWU, we are moreover *impelled to adhere* to the opinion, derived from our experience in administration of the act, that conclusionary evidence of this nature is IMMATERIAL to issues such as those presented in this case,"

is there any doubt, which should be taken over by this Court on certiorari, as to the correctness of the Court of Appeals' opinion in setting aside the Board's order which is based upon its expressed refusal to consider material evidence as material?

(2) Where the *statute* creating the Board provides that the Court of Appeals shall have jurisdiction to control the proceedings of the Labor Board when they violate fundamental rights and due process, using in part the following language:

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board;" (29 U. S. C. A., ch. 7, Sec. 160)

and where *this Court* has specifically held in *National Labor Relations Board* v. *Indiana and Michigan Electric Company*, 318 U. S. 9, 87 L. Ed. 579, that the Circuit Court of Appeals has the power and right to direct the Labor Board to take and receive as material and of some weight specific evidence, is there any reason for this Court to grant certiorari in order to repeat this definite and well-established principle of law?

(3) Where all of the employees, and a majority of the five ex-employees appearing on behalf of the Labor Board, testify or file affidavits and are offered as witnesses that the plant union was the free-will choice of the employees; and where such plant union has been operated effectively for years, securing many settlements of disputes advan-

tageous and satisfactory to the employees; and where the employees have repeatedly petitioned for a secret election and offered to abide by its result if carried on at any time over a period of years, and have been refused such opportunity; and where the only evidence of domination is by inferences, which might be interpreted as favoring either side, as against the practically universal testimony of those who know the facts and whose testimony is unimpeached and uncontradicted—did the Court of Appeals not only err but exceed its discretion in ordering that the testimony of these employees must be considered as material although the exact weight to be given to it is a matter for the Board?

(4) Where the Court of Appeals points out as an additional denial of due process the bias and prejudice of the trial examiner, the fact of his reassignment to take the evidence on the second hearing also, and the fact that his opinion and belief of the immateriality of the evidence of the employees remained fixed and unmodified by the specific direction of the Court of Appeals to the contrary, can there be any question for this Court as to the correctness of the Court of Appeals' opinion and order in setting aside the order of the Labor Board?

(5) Where the treating of substantial and material evidence as wholly immaterial is of itself sufficient to make it necessary to set aside the finding of the Board, is it necessary or useful for this Court to grant certiorari in order to consider whether there might have been other grounds which would also have made it necessary to set aside the order of the Board?

Statutes Involved.

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 32-34.

STATEMENT OF FACTS.

The parties to this matter are the Donnelly Garment Workers' Union, an unaffiliated union representing all the workers in the Donnelly Garment Company except those not eligible, and hereafter referred to as the DGWU, respondent herein; the Donnelly Garment Company of Kansas City, Missouri, a Missouri corporation in the business of manufacturing women's dresses, designated as the Company; the International Ladies' Garment Workers' Union, a widespread organization with offices in many states, referred to as the International; and the National Labor Relations Board, hereafter called the Board.

The statement of facts submitted in the Board's brief is actually its *Findings of Fact* in the second hearing, and it has prefaced each of its citations to the record by a citation to these findings. It was on the basis of the entire record—not on the findings of fact by the Board—that the Circuit Court of Appeals determined that due process had been denied this respondent. We therefore set forth below a part of the omitted picture. The court below included in its opinion the statement of facts which we contend the evidence shows. (151 F. (2d), l. c. 864-869) and we adopt that statement of facts as ours, and amplify it, with citations to the record, in the following statement:

In the spring of 1937 the International entered the Kansas City labor field with the announced purpose of making itself the bargaining agent for all workers in the local garment manufacturing industry (V 1532, 1549). In the progress of this campaign against workers in plants of other employers near that of the Company, violence was freely used for about thirty days without any affective protection by the local police (VII 2154, XI 4101, 4165-6).

The employees of the Company, mostly women, terrified by these occurrences and by threats of similar or greater force which would be used against them in turn unless they joined the International (IV 1336f, 1336cc, 1336ggg), had a general meeting to consider ways and means of self-protection (VIII 2568, 2920).

On March 27, 1937, a committee of workers retained legal counsel to advise them on means of protection (II 577; IX 3193). The Board is inaccurate when it states (Br. p. 14) that the purpose for which an attorney was hired was to oppose the ILGWU. Its citations to the record do not support that conclusion, but instead clearly state "what we had in mind was an injunction of some kind of protection" (I 176), and at II 556, "we told Mr. Tyler * * * we were desirous of knowing what we could do, or what could be done for us in the way of getting protection against such things (violence) as were occurring at the Missouri, Gordon & Gernes Brothers plants." On April 12, 1937, the newspapers (VII 2154, XI 4177-4179) publicized the decision of the United States Supreme Court sustaining the National Labor Relations Act, calling particular attention to the holding that workers had the right to organize their own unions, affiliated or not, to serve as their bargaining agents under the protection of the Board.

On April 27, 1937, in reaction to the violence, with the advice of their own attorney, the employees voluntarily formed their own union, the Donnelly Garment Workers' Union (II 559-561; IV 1336i, 1336ll-1336oo, 1336ww, 1336iii-1336jjj; also Board witnesses at X 3514, 3581-3582). Practically all in the Kansas City plant attended this meeting which was held in space independent of Company control and without management domination

(VIII 2565-2566, 2914-2915; IX 3006, 3078, 3122, 3187-3188).

An executive committee was selected after careful consideration, and on May 27, 1937, conferred with Mrs. Reed, the managers of the Company, and the attorney for the Company and arrived at a contract concerning wages, hours, and terms of employment and providing, among other things, for a closed shop. This contract has been supplemented by another agreement, increasing wages, negotiated on June 22, 1937, and affected by further negotiations from time to time (I 105, II 580-582, 713-714; III 812). Meetings of the DGWU have been held frequently since then and have been well attended (I 105, II 584, 718; III 830-865; IV 1336m).

Since its organization, the DGWU has functioned continuously and effectively as the chosen forum and bargaining agent of the workers and its activities have been entirely self-supported and self-controlled (I 216-217, 228, 235; II 430, 624, 692-694, 718g, 718r; X 3763-3766, 3774).

On April 6, 1939, the acting regional director for the 17th Region of the National Labor Relations Board filed a complaint against the Company and amended this on April 27, 1939, withdrawing the original charge. The complaint alleged that the Company was engaged in unfair labor practices affecting interstate commerce by dominating the DGWU (A. 369-370). The Donnelly Garment Workers' Union, this party, received a copy of the complaint, the amendment, and notice of hearing as party to the contract with the Company, and upon permission of the director intervened and filed its answer (A. 381-382). This party also then filed with the Board its formal application requesting that the Board hold a secret election at the plant in order to determine the em-

ployees' choice of bargaining agent (A. 409-410). The Board did not grant the application for an election, and although an election on several other occasions had been requested, the Board has uniformly refused to act (A 560; III 783; IV 1336qqq; VI 1693-1729; X 3844; XI 3965).

Trial Examiner Batten conducted the hearing for the Board, sustained the complaint, and was sustained in turn by the Board. In November, 1941, the Circuit Court of Appeals remanded the case to the Board (123 F. (2d) 215).

The language of the court in directing that the testimony of the employees as to their choice of a labor union and their reasons for forming it, be received and considered as material, regardless of the particular weight the Board might give to it, is as follows:

> "We have no doubt that the testimony offered by the petitioners in their efforts to prove that the employees of the Donnelly Company formed the Donnelly Garment Workers' Union *of their own free will* and that the *formation and administration* of the union was free from employer influence, domination and support, and to explain how and why they came to organize the union, was *competent, relevant* and *material* and should have been received. The individuals who form an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, who influenced its formation, and who controls it. We think there can be no doubt of the right of the members of such an organization to testify to such matters, and that their evidence is admissible regardless of its weight." (l. c. 222.)

The court then said (l. c. 224):

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive

and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. (Citing cases.)

"The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered."

The express holding of the court was (l. c. 225):

"Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner, and *to receive and consider such evidence together with all other competent and material evidence* in the record before making new findings and a new order."

Trial Examiner Batten, over the objection of the DGWU and the Company, again was appointed as Examiner and heard the case in July to September, 1942. He first permitted the Company to introduce testimony of Mrs. Reed, president of the Donnelly Company, and some eleven employees. At the opening of the hearing Examiner Batten stated that the employee testimony was relevant and was material, and that he was agreeable to hearing it (VII 2518). But after the testimony of Mrs. Reed and only eleven employees had been received on behalf of the Company, and *before* the employees' organization (DGWU) had offered testimony, the Examiner ruled:

> "Then, I will now determine that I have heard enough employee witnesses, both as to the respondent and the intervener.
>
> "So that disposes of that matter" (IX 3255).

The DGWU was permitted to put on six witnesses in surrebuttal, but only as to questions raised previously before the Board (X 3765, 3766, 3770, 3773, 3775, 3777). The Trial Examiner and the Board, after refusing this evidence, reached the same conclusion that they had before (III 764-796). The Board's opinion on this point is:

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the DGWU, we are moreover impelled to *adhere* to the opinion derived from our experience in administration of the act, that conclusionary evidence of this nature is *immaterial* to the issues such as those presented in this case" (A. 619).

On appeal again to the Eighth Circuit Court of Appeals (151 F. (2d) 854) that court again refused to enforce the order of the Board.

SUMMARY OF ARGUMENT.

(1) The court below acted in accordance with established law and no new or novel question is involved. It is not necessary to "probe the mental processes of the Board" in order to know that the Board flatly refused to treat as material vitally important evidence which the Court of Appeals specifically directed the Board to consider as material evidence, for the Board states in so many words that it adheres to its previous opinion that the evidence in question is immaterial. The law is clear that in such situation due process is denied and the Board's order must be set aside as was done by the Circuit Court of Appeals. No good purpose would be served by the granting of certiorari by the Supreme Court merely in order to reassert this principle already firmly established in the law.

(2) The case at bar is not in conflict with the cases relied on by petitioners. We have grouped the cases in the argument in order to show briefly that they are not in point.

(3) This litigation should end. Federal courts have repeatedly found the fact to be that the DGWU is the free-will choice of the employees as bargaining agent and no court has ever found to the contrary. In two hearings of some six weeks each, the Board has completely failed to make a case and in categorically refusing to follow the Circuit Court of Appeals' ruling as to what is material evidence, it has admitted that it is unable to make a case. If it accepts as material, testimony of the employees as to their choice of a labor union and how and why they formed it, the unanimous testimony or affidavits of all of

the 1100 employees, plus a majority of the five ex-employees relied on by the Board itself that the DGWU was the free-will choice of the employees, mere inferences would be completely destroyed. If the Board refuses to consider such testimony as material it violates the established principles of law and common sense and it expressly refuses to follow the directions of its supervisory court as to what is material evidence in this case. The Board admits on page 50 of its brief that it cannot establish a case by any ordinary procedure and it does not care to make another effort to do so, its hope being that the Supreme Court will merely enforce the order of the Board and ignore all decisions and opinions of the Circuit Court of Appeals. The DGWU has carried on this fight, maintaining its organization and paying all of the expenses of the litigation for seven years, and being ready at any point in that seven years to establish the fact of its being the choice of the employees by secret election, by testimony on oath on the witness stand, and by affidavit. It should be relieved of the burden of any further litigation.

ARGUMENT.

I. The Court Below Acted in Accordance with Established Law and no New or Novel Question Is Involved.

The Circuit Court of Appeals acted within the jurisdiction vested in it by the statute creating the Board, (quoted *supra*, p. 3.)

Further, the court has acted in accord with the definite and well-established rule of law as specifically stated in the recent case of *NLRB* v. *Indiana and Michigan Electric Company*, 318 U. S. 9, 87 L. Ed. 579, wherein this Court sustained the Circuit Court of Appeals in its direction to the Labor Board to take and consider certain evidence on a remand (p. 585, L. Ed.). The Board resisted this instruction and decision on the ground that such evidence was either cumulative or immaterial and that therefore the Court of Appeals committed error in directing that it must be taken and considered by the Board. The Supreme Court sustained the Court of Appeals, pointing out that the Court of Appeals has control over the Board in such matters and that such control should not be disturbed unless the Court of Appeals has acted arbitrarily or abused its discretion. This Court held that in order to reverse the Court of Appeals the Supreme Court must not only disagree with the Court of Appeals as to whether, under the circumstances of that case, the evidence in question was material, but it must also find that the Court of Appeals was so grossly wrong as to amount to abuse of discretion. See p. 585:

> "Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our own view of the case, but that the

court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must not only have been in error but must also have abused its judicial discretion."

So in the case at bar, in order to reverse the Court of Appeals, this Court would not only have to disagree with the Court of Appeals as to whether the sworn testimony of all the employees as to their choice of a bargaining representative and how they arrived at it was material in determining that point, but this Court would have to take the further step of holding that in reaching its decision on such question the Court of Appeals acted arbitrarily and abused its discretion. The decision that the testimony of many witnesses as to their choice, intent and free will is material and must be given some weight in the absence of any evidence the Board may produce that such testimony was perjury, or was so unintelligent that the witnesses did not understand what they were testifying about, is clearly correct. Perhaps every rule has exceptions and even though theoretically it might be urged that such rule, which is as old as the common law itself, might not apply, yet the Court of Appeals had the power and the duty of determining the question of whether it applied here and it would be merely absurd to say that they grossly abused such discretion, or that discretion did not extend to this point, and therefore that certiorari should be granted.

In an effort to distinguish the Indiana & Michigan case the Board points out that in that case the *witnesses* before the Board were guilty of violence and destruction of property, while in the case at bar there was no showing

that the witnesses were themselves guilty of violence, though it must be conceded that there was much violence in the campaign of the International directed toward organization of the Donnelly employees by first organizing the smaller nearby plants and showing the Donnelly employees what would happen to them if they did not join (IV 1336f, 1336y, 1336cc, 1336hh, 1336vv, 1336aaa, 1336ggg, 1336vvv; VIII 2853).

Whether this is a valid distinction or not, and we submit that it is not, at least it completely misses the point of the Indiana and Michigan case. The doctrine of that case is *not* that the Court of Appeals has the power and duty to direct the taking into consideration of the evidence it holds to be material, *only in case such evidence is concerning violence*. The holding and the law is that the Court of Appeals has the power and duty to direct the taking and consideration of evidence which it determines as material and important under the circumstances of the case, regardless of whether such evidence concerns violence or any other point that is material to the litigation. This Court has said in the Indiana and Michigan case:

> "But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed" (l. c. 591).

The twice repeated refusal to accept as material and give any weight to the testimony of the employees is conclusive on the denial of due process. A further hearing and opinion on this case would add nothing whatever to the law as set forth in the Indiana & Michigan case.

Nor is there any ruling or finding in the opinion of the court in the Donnelly case that any further hearing is necessary.

As the Board points out in its brief (p. 32) the Court of Appeals, after twice firmly pointing out to the Board that the testimony of the employees was material, referred to the possibility of certiorari. Obviously its position was that it had no doubt whatever as to the materiality of this evidence and the necessity of its being considered as material, but that if the Board was still unwilling to accept this view the only possible chance to avoid complying with it was application for certiorari in which the Supreme Court would either approve the opinion of the Circuit Court of Appeals or determine that that court had so misunderstood the law or exceeded its discretion as to make a hearing before the Supreme Court necessary.

In an earlier opinion in this same controversy the same judge pointed out in reference to another matter, that if the DGWU and the Company felt that error had been committed by the court against them, "The error is one which properly can be corrected only by the Supreme Court of the United States on certiorari" (123 F. (2d) l. c. 220-221), and it was equally clear that such language did not mean that in the court's opinion certiorari should be granted.

If the Court of Appeals had desired to intimate that the Supreme Court should grant certiorari it would have taken the appropriate action in such situation: i. e., certification to the Supreme Court under the provisions of the Judicial Code, Sec. 239, as amended, 28 USCA 346 (see appendix).

II. The Case at Bar Is Not in Conflict with the Cases Relied on by Petitioners

As cited by the Board:

1a. In holding that the Board was required to consider employee testimony.

In the case of *Bethlehem Steel Co.* v. *NLRB*, 120 F. (2d) 641, the court's ruling with regard to employees' testimony deals with the effect *their* testimony would have on other evidence which had previously established the fact that the Plans were started in 1918, were concededly Company supported and managed for nearly 20 years prior to 1937, and at that time were amended in an attempt to make them conform to the provisions of the National Labor Relations Act. The Court found, "The amendments could not erase from the minds of the employees the well-known and long-continued Company encouragement and approval of the Plans" (l. c. 646).

Facts similar to those in the above case, *i. e.*, a long period of admitted company-control and management of a plant union with amendments in 1937 to conform to the Act—also are found in the following cases cited by the Board:

Bethlehem Shipbuilding Corp. v. *NLRB*, 114 F. (2d) 930 (see l. c. 937 and 941).
American Enka Corp. v. *NLRB*, 119 F. (2d) 60 (see l. c. 61 and 63).
NLRB v. *Newport News Shipbuilding Co.*, 308 U. S. 241, 84 L. Ed. 219 (see l. c. 244, 251).

The Donnelly Garment Workers' Union was *organized* in 1937 and hence there could not have been amendments made in an effort to conform, and thus no "Company encouragement and approval" to be erased from the

minds of the employees. Therefore, the ruling of the Circuit Court that in *this* case and in *these* circumstances the testimony of employees was material was not in conflict with the Bethlehem case or any of the other above cited cases and was within the discretionary powers of that court.

Further, these cases do not deal with, give consideration to, nor determine the effect of a remand by the Circuit Court of Appeals to the Board with instructions to hear and consider employee testimony. They represent petitions to review the Board's original order.

In *Western Cartridge* v. *NLRB*, 134 F. (2d) 240, the company refused to recognize an A. F. of L. Local No. 22574, for which the employees had voted and which the Board had certified, but instead the company continued to deal with and support the Independent (l. c. 243); and the Independent (as a petitioner for review of the Board's order) contended it was denied a fair trial because its individual members were not permitted to testify. On this point the court said:

> "To be sure, as a general rule, findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, the Board's findings is heard and weighed" (l. c. 244).

However, in that case, the Company having refused to deal with the Local for which the employees had voted, and there being "cogent, specific evidence of the Company's interference" the court held the Independent had received a fair hearing (l. c. 245).

The case here ~~certified~~ considered *is in agreement*, not in conflict, with the above stated general rule. Here the employees

voted for the DGWU as their choice for a bargaining agent; here there is not "cogent, specific evidence" upon which to base a finding that the employees had received a fair hearing.

Also in *NLRB* v. *New Era Dye Co.*, 118 F. (2d) 500, the company refused to bargain with the authorized union. Twenty-five of the 39 employees voted for the union, and the company offered employee testimony to show that 21 *later* revoked their authorization. The court ruled that, the company having committed *proven* unfair labor practices *before* the revocations occurred, such employee testimony was not material (l. c. 505).

In the following cases cited by the Board, it *did* receive and *did* consider a substantial amount of employee testimony. Therefore, the holding by the court in the instant case that previously refused employee testimony must be received and considered by the Board could not be in conflict with rulings in these cited cases on the admissibility of employee testimony:

NLRB v. *Brown Paper Mill Co.*, 108 F. (2d) 867 (shows testimony by 708 members, l. c. 937).

Bethlehem Shipbuilding Corp. v. *NLRB*, 114 F. (2d) 930 (testimony received from "various employees," l. c. 937).

American Enka Corp. v. *NLRB*, 119 F. (2d) 60 (a large number of employees testified, l. c. 62).

NLRB v. *Newport News Shipbuilding Co.*, 308 U. S. 241, 84 L. Ed. 219 (results of secret ballot were in the record, l. c. 248).

NLRB v. *Automotive Maintenance Mach. Co.*, 315 U. S. 282, Rev. 116 F. (2d) 350 (testimony of "nearly all of the employees was included," l. c. 356).

16: In holding that the Examiner was disqualified to preside at the hearing on remand.

The Court in *NLRB* v. *Air Associates, Inc.*, 121 F. (2d) 586, found that inasmuch as the Board *disregarded* the trial examiner's report, that even though he were biased it was not prejudicial to the parties (l. c. 588). In the subject case, the Board *adopted* the examiner's reports on both hearings.

Of like effect is the holding in *NLRB* v. *Weirton Steel Co.*, 135 F. (2d) 494. Here the allegedly biased trial examiner was superseded during the original hearing, and he made no intermediate report. The Court found that the effect of his bias was overcome by the appointment of a second examiner who did afford a full and unbiased hearing. The facts and the issues regarding the trial examiner in the above two cases are such as to make any holdings of the courts as to bias in them not in conflict with the case at bar.

A representative proceeding as to the unit appropriate, not a complaint proceeding as here, is in issue in *NLRB* v. *Botany Worsted Mills*, 133 F. (2d) 876, l. c. 882. Further, it was contended in the Botany case that the appointment as a trial examiner one who had conducted the preliminary investigation established, *per se*, his bias. The court held that this did not preclude his affording the parties a fair hearing.

This is substantially different from appointing, over the objection of the parties, the same examiner for a second hearing when he had previously announced publicly and had recorded his opinion on all the issues involved.

The decisions in the two cases: *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 57 L. Ed. 1379, and *Berger*

v. *U. S.*, 255 U. S. 22, 65 L. Ed. 481, deal (1) with the right of a senior judge to compel Judge Chatfield to continue with a bankruptcy hearing, and (2) with the right of Judge Landis to preside at a criminal trial. In both cases the point was whether the respective judges should continue in the *original* (not remanded) proceedings and to hear the cases, after affidavits of prejudice had been filed against them; not as here, where the point involved is whether the examiner is a proper party to hear the case on remand, after he has once rendered his opinion on the issues. Petitioners (NLRB and ILGWU) in the case at bar indicate in their briefs that the court held that the reason the examiner was disqualified was because of his "erroneous rulings." The fact is that the court held he was disqualified because he had prejudged the issues—not that he had made mistakes in ruling on the law (151 F. (2d), l. c. 870).

In *U. S.* v. *Morgan*, 313 U. S. 409, 85 L. Ed. 1429, the Secretary of Agriculture had made public statements to the press which were said to show his bias. The court found that, the Secretary having admitted that his statements were made on an erroneous understanding of the court's prior decision and having shown that he did consider and weigh the market conditions, the previous statements showing bias were overcome. The court concluded that "nothing in this record disturbs" the assumption that the Secretary judged this "particular controversy fairly." (l. c. 421.) In the case at bar, there is no admission on the part of the examiner that he might have been in error in his original rulings, nor any showing that he did consider or weigh the evidence which the Circuit Court of Appeals has twice held to be material.

2. In holding that evidence should have been received and considered showing DGWU contracts contained similar provisions to ILGWU contracts.

The company in *Bethlehem Steel Co.* v. *NLRB* (*supra*) was denied issuance of a subpoena to McDonald for the purpose of questioning him regarding "dates, scope, duration and terms" of SWOC agreements. In that case similar provisions in contracts made by the plans with Bethlehem had not previously been put in issue by the Board. The court found that under those circumstances the designated questions to be asked McDonald were irrelevant (l. c. 651).

The decision of the court on that state of facts cannot be in conflict with the one at bar, wherein the DGWU's contracts had been put in issue by the Board, were relied on by it in its findings, and determined by it to be a "sham" (l. c. 862, 864). DGWU's offer was to establish that provisions in its contracts were bona fide and usual 151 F. (2d), l. c. 868).

3. In holding as material to the issues evidence that ILGWU admits to membership employees having supervisory duties.

In *New Idea, Inc.* v. *NLRB*, 117 F. (2d) 517, the Board did receive and did weigh testimony that "supervisory" employees were eligible to be, and in fact were, members of both the Association and the A. F. of L. (l. c. 523). In the DGWU case the examiner *refused* to receive evidence that "supervisory" employees were admitted to the ILGWU, or that the employees he labeled as "supervisory" were not usually so considered by the *garment industry* (*supra*, l. c. 875).

There is no showing in either *NLRB* v. *Aintree Corp.*, 132 F. (2d) 469, or in *International Assn. of Machinists* v. *NLRB*, 311 U. S. 72, 85 L. Ed. 50, that due process was not afforded all parties, or that all the evidence proffered

by the respective companies was not received. Neither is any comment made in these two cases as to the effect of membership of "supervisory" employees in ILGWU and/or "The Better Union" in the first case; or in the A. F. of L. and U. A. W. in the second case. Those cases do not have occasion to rule on issues in any way similar to the case at bar and, therefore, the opinions therein do not conflict with this decision.

We believe that regardless of whatever degree of importance the court may attach to the denial of due process by reason of the bias of the examiner, the error in his reappointment for the second hearing or the refusal to admit evidence of other contracts, the decision of the Court of Appeals must stand because of the clear refusal of the Board to treat vitally important material evidence as material. No decision complies with the due process requirement where that situation is shown to exist.

The Board cites in its petition six cases which deal with procedural matters, the gist of which is as follows:

Three to show right of this Court to review interlocutory decisions (pages 34 and 35):

Panama R. R. v. *Napier Shipping Co.*, 166 U. S. 280, 41 L. Ed. 1004, determines jurisdiction in admiralty case, when Circuit Court of Appeals limited its second review to question of damages.

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 60 L. Ed. 629, determines right of Sp. Ct. in patent infringement case to notice and rectify errors in interlocutory proceedings.

Simmons Co. v. *Grier Bros. Co.*, 258 U. S. 82, 66 L. Ed. 475, deals with Bill of Review in patent infringement, and holds that the Bill may be granted

only after final decree. Case also sets forth when a decree is interlocutory and when final.

And three to show that this litigation should end (pg. 43):

Sorensen v. *Pyrate Co.*, 65 F. (2d) 982, on second hearing after remand for assessment of damages, defendants for the first time attacked validity of contract. Court said this defense should have been urged at first trial, and defenses should not be presented by piecemeal.

Roberts v. *Cooper*, 20 Howard 467, 15 L. Ed. 969, deals with what matters the Supreme Court will consider on second writ, and concludes that "none of the questions before it on first writ can be reheard or examined upon the second" (l. c. 973), else obstinate litigants could compel the court to listen to criticisms of their own opinions.

U. S. Trust Co. v. *N. M.*, 183 U. S. 535, 46 L. Ed. 315. This is a suit brought by Territory of New Mexico to collect taxes, and liability is denied *in toto*. The District Court had dismissed the intervening petition, stating it did not show on its face a valid claim. The effect of the Supreme Court's having reversed that order, was that the inquiry starts with the adjudicated fact that a valid claim is presented (l. c. 319).

We heartily agree that this litigation should end *now*. As cited by ILGWU:

This petitioner (Br. p. 25) only partially states the ruling of Chief Justice Hughes in *Morgan* v. *U. S.*, 304 U. S. 1, 82 L. Ed. 1129. The full quotation is: "It was not the function of the Court to probe the mental processes of the Secretary in reaching his conclusion *if he gave the hearing which the law required.*" In both this case and the one at bar the courts have ruled that the parties did not receive "the hearing which the law required." But the

Court in this case did not need to resort to "probing" to ascertain the mental processes of the Examiner and the Board, for the Record shows that both considered and declared as immaterial the proffered employee testimony in the first hearing (A. 560, VI 1693) and continued to so assert after the Court remanded the case (A. 619, X 3844).

We find in *NLRB* v. *Bradford Dyeing*, 310 U. S. 318, 60 Sup. Ct. 918, 84 L. Ed. 1226, that the Court found that the rulings "manifested liberality," the proceedings were conducted in a manner calculated to bring a just result; and the rights of a full and fair hearing were "solicitously guarded" (l. c. 1242). The findings have been the direct opposite to the above, by the courts who have reviewed the proceedings herein (123 F. (2d) 215, 225; and 151 F. (2d) 854; see as to "rulings," points 3, 4, 5 and 7; as to "conduct of hearings," points 1 and 2; as to "fair trial," the conclusion, l. c. 875.)

The point in issue in *Federal Com. Com.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 60 Sup. Ct. 437, 84 L. Ed. 656, is whether, under remand from the Court of Appeals to reconsider an application for a broadcasting station, the Commission must confine its consideration to matters presented in the original record (l. c. 660). This Court ruled that the Commission was not confined to the original record but should reconsider the application on a comparative basis, and further stated: "On review the court must thus correct errors of law and on remand the Commission is bound to act upon the correction" (l. c. 663).

In *Fly* v. *Heitmeyer*, 309 U. S. 146, 60 S. Ct. 443, 84 L. Ed. 664, this Court said that the only relevant difference between this case and the Pottsville case (*supra*) was

that here the Commission proposed also to receive *new* evidence. This Court held that whatever new evidence was necessary for the Commission to receive in order to discharge its duty under the law, should be received.

There is no conflict between the two cited cases and the one here considered. The issues of a fair hearing are not involved in the cited cases, but rather the scope of the hearing upon remand. However, all three cases have held that the courts do have the power to "correct errors of law and on remand the" administrative agency "is bound to act upon the correction."

This petitioner cites in support of its contention that the Court erred in holding due process was denied because of the designation of the same trial examiner, five cases:

In *Walker* v. *United States*, 116 Fed. (2d) 458, a conspiracy case, the Court states that no action or conduct of the judge indicative of bias is alleged except erroneous rulings of the court, and bias and prejudice must be urged on something other than rulings in the case (l. c. 462).

Likewise, in *Ryan* v. *United States*, 99 Fed. (2d) 864, the ruling is the same, and the court adds, "If there is error in such rulings, it may be corrected on appeal" (l. c. 871).

In an action for injunctive relief in *Refior* v. *Lansing Drop Forge Co.*, 124 Fed. (2d) 440, the judge having evinced irritation over the delay of the parties in bringing the case to trial and having made adverse rulings to Refior, was said to have shown bias, and an affidavit was filed against him. The Court held that a judge may not be ousted because of adverse rulings, since they are reviewable otherwise (l. c. 444).

In contempt proceedings of *O'Malley* v. *United States*, 128 Fed. (2d) 676, the Court said that "Judges may, and indeed must, make rulings as matters present themselves, and having done so are not subject to a charge of prejudice" (l. c. 685).

Berger v. *United States*, 255 U. S. 22, 41 St. Ct. 230, is also cited. This case we have discussed *supra*.

In all of the above five cases the issue involved the effect of erroneous rulings, not the denial of due process, because of the appointment of the same judge to hear the second time the same case, wherein he had already announced his decision on the issues, as in the case at bar. Therefore, the rulings in the cited cases are not in conflict with the one at bar.

III. This Litigation Should End.

The Board says in its brief at page 43, quoting from *Sorensen* v. *Pyrate Corp.*, 65 F. (2d) 982, 965, "* * * the proper administration of justice demands that there be an end to litigation * * *." With this statement we unqualifiedly agree, and to it we would add an equally well-known principle that "Justice delayed is justice denied." There have been some fifteen opinions in the Federal and Supreme Court Reporters on the Donnelly situation —injunction, damages and labor dispute (see table of cases in appendix). Twice the Labor Board after hearings of some six or seven weeks has completely failed to make a case and has in its second opinion admitted that it cannot follow the law and make a case by its declaration that, in spite of the Court of Appeals' opinion and ruling that testimony of employees is material and must be considered, the Board is "Impelled to adhere to the opinion * * * that evidence of this nature is *immaterial*. * * *" (A. 619). After very substantial hearings Fed-

eral courts have repeatedly found the fact to be established beyond any doubt that the DGWU is a bona fide labor union formed and administered by the free-will choice of the employees without any domination or coercion of the employer.[1] In some of these opinions the court has refrained from any finding or opinion on this point, but in no decision has any court expressed any opposite view or conclusion as to the evidence presented over many weeks of testimony and at various times over a period of seven years. Repeatedly employees have testified that the DGWU was their free-will choice of a bargaining agent and all employees in good faith have been ready to so testify over a period of seven years. At least twice the testimony of *all* employees has been tendered in open court or before the Labor Board and the solemn

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[1]We have included in this brief only two excerpts from the Court's opinions:

21 F. S. 807, l. c. 809 (1937):

"Among these employees there are no members of defendant union shown by the evidence, and no division exists among them. The proofs overwhelmingly establish that they are neither company inspired nor dominated. To insure their full independence of action, they have consulted able counsel of their own choosing, and have perfected their organization in full accord with the provisions of the National Labor Relations Act, 29 U. S. C. A. 151 *et seq.*"

And the last is like the first:

151 F. (2d) 854, l. c. 877 (1945):

"For more than seven years the employees have defended the plant union, at great expense to themselves, before every tribunal in which its integrity has been called in question. Throughout this period they have been fully advised of their rights under the National Labor Relations Act. There have been no defections from their ranks. None of them permitted to testify have been impeached on the witness stand. The credibility of none of them has been attacked. Five years after the organization of the plant union all of its members have testified to their deliberate choice of it as their agency for collective bargaining with their employer. In this situation there is no room, in my opinion, for the inference that these employees have been and continue to be, the victims of an illegal coercion by means unknown to them and too subtle to be susceptible of proof, or from the inference that they have surrendered their right freely to choose their labor affiliation in return for the occasional inconsequential use of the Garment Company's telephones, mimeograph machines, and office facilities."

The following citations say substantially the same:

99 F. (2d) 309, 313-4 (1938).

119 F. (2d) 892, 893 (1941).

123 Fed. (2d) 215, 222 (1941).

55 F. S. 587, 490 (1944).

affidavits of all the employees to this fact is in the record in this case. The Board asserts (Br. p. 9) that it "called several (5) of the 1,200 employees, who testified *contrary* to the offer of proof." This is not a correct statement. These five ex-employees had vigorous complaints as to the way they were treated by the Company or its officers or the plant union, but when it comes to the question as to whether the employees formed the plant union by their own free-will choice and in accordance with their own wishes, at least the majority of these five Board witnesses readily agree that it was the free-will choice of the employees, which is the very fact petitioner put them on the stand to disprove and, after a search of several years for such testimony, these five disgruntled ex-employees are the only witnesses the Board did put on or offered to put on to testify that the DGWU was not the free-will choice of the employees. Etta Dorsey and Lola Skeens both stated on the stand that their prior statements that the employees formed the union and operated it without any outside influence was true (IX 3383; X 3463). Their testimony shows that what they were interested in and what they wished to talk about were their personal grievances against the Company or the plant union. But so far as the question of the actual choice of the overwhelming majority of the employees goes, they readily agree that the employees wanted their own plant union. Geneva Copenhaver testified in the second hearing, as one of these five ex-employee Board witnesses, that in her opinion it was the violence of the International against nonmember employees at points some eight blocks away and the desire to secure protection from such contemplated attacks upon themselves, which caused the employees to form their own union (X 3514). Repeatedly the plant union has requested and been denied an official

but completely secret election to demonstrate the fact of their choice yet again. One of the attorneys for the International is in the record as having admitted that the employees do not want the International as their bargaining representative but that the employer must compel them to accept it or go through this litigation (V 1402).

Now the dilemma of the Board in this extraordinary situation of the evidence is obvious. If they admit that the testimony of employees and ex-employees as to the voluntary actual free-will choice of the DGWU as their bargaining agent is of any weight whatever (*i. e.*, is material), then it is so strong, so unweakened and so overwhelmingly in support of such undominated choice (including the testimony of the Board's own witnesses) that it cannot be effectively opposed by mere inferences drawn from claims which prove nothing in themselves and which generally do not exist at all unless weak evidence against the overwhelming weight of all the testimony is accepted.

The unanimous testimony of witnesses who know the facts and who are not in any way shown to have committed perjury or misunderstood the facts, or to have been contradicted by opposing witnesses, cannot be overcome by mere inference, and especially when the Board has the burden of proof. (*Woodward* v. *C. M. & St. P. Railway*, 145 Fed. 577, 582; *Cupples* v. *NLRB*, 106 Fed. (2d) 100, l. c. 104; *NLRB* v. *A. S. Abell*, 97 Fed. (2d) 951, l. c. 957; *NLRB* v. *Mathieson*, 114 Fed. (2d) 796, l. c. 801; *Quaker State Oil* v. *NLRB*, 119 Fed. (2d) 631, l. c. 632; *L. Grief & Bro.* v. *NLRB*, 108 Fed. (2d) 551, l. c. 558; *NLRB* v. *Sun Shipbuilding*, 135 Fed. (2d) 15, l. c. 25; *NLRB* v. *Union Pacific Stages*, 99 Fed. (2d) 153, l. c. 177; *Donnelly Garment Company* v. *NLRB*, 123 Fed. (2d) 215, l. c. 224; *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9, 87 L. Ed. 579, l. c. 592.)

On the other hand, if the Board refuses to consider as material the testimony of all of those who know the fact to be determined it violates the simplest principles of evidence, common sense and fair play, and also the express and explicit ruling of its supervisory court in this very case as to what is material evidence. The Board chooses the second of these two alternatives as the lesser of two evils. It urges on the last page of its petition that the Court of Appeals has twice refused to enforce the Board's order, "On some procedural or due process question," and that it might do so again, and it therefore requests that the Supreme Court simply ignore the function and duty of the Court of Appeals and issue a decree enforcing the Board's order, in the teeth of the clear lack of due process and the Board's flatly declared intention of not abiding by due process, and of the overwhelming and conclusive evidence that such action would deprive the employees of the very rights which the Wagner Act was passed to secure to them. If the Court of Appeals no longer has power or authority or discretion to pass on questions of materiality of evidence and due process, after repeated, full and deliberate hearings, then order and responsibility have disappeared from judicial proceedings.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX.

Sec. 239 Judicial Code, amended, 28 U. S. C. A. Ch. 9, Sec. 346, amended:

Certificates of questions by circuit courts of appeals and Courts of Appeals of District of Columbia. In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by appeal.

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Prevention of Unfair Labor Practices—Powers of Board Generally.

Review of final order of Board on petition to court:

Sec. 10 (f) " * * * upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *"

Donnelly Opinions.

On Labor Board Litigation

21 NLRB 164
123 F. (2d) 215
50 NLRB 241
151 F. (2d) 854

On Injunction

20 Fed. Supp. 767
21 Fed. Supp. 807
304 U. S. 243, 82 L. Ed. 1316
23 Fed. Supp. 998
99 F. (2d) 309
305 U. S. 662, 83 L. Ed. 430
119 F. (2d) 892
121 F. (2d) 561
47 F. Supp. 61
47 F. Supp. 65
47 F. Supp. 67
55 F. Supp. 572
147 F. (2d) 246
55 F. Supp. 587